

IN THE MISSOURI SUPREME COURT

SC92800

**THE STATE OF MISSOURI, ex rel. TIM E. DOLLAR, THE LAW OFFICES OF
TIM DOLLAR n/k/a DOLLAR, BURNS & BECKER, LLC,
MICHAEL P. HEALY, and THE HEALY LAW FIRM, LLC,
Relators,**

vs.

**THE HONORABLE SANDRA C. MIDKIFF,
JUDGE OF THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI at KANSAS CITY
Respondent.**

**Petition for Writ of Prohibition
From the Circuit Court of Jackson County, Missouri
Case No. 1116-CV07373**

RELATORS' BRIEF

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JURISDICTIONAL STATEMENT

Relators Tim E. Dollar, The Law Offices of Tim Dollar n/k/a Dollar, Burns & Becker, LLC, Michael P. Healy, and The Healy Law Firm, LLC petitioned this Court for an Original Writ of Prohibition against Respondent, The Honorable Sandra C. Midkiff, Judge of the Circuit Court of Jackson County, Missouri, prohibiting Respondent from enforcing her Orders overruling Relators' Motion to Dismiss and Relators' Motion for Summary Judgment in *Matthew Headly Holdings, LLC v Dollar, et al*, Case No. 1116-CV07373, in the Circuit Court of Jackson County, Missouri, because the claims against Relators therein are barred by the five (5) year statute of limitations provided in § 516.120, R.S.Mo.

This action for prohibition involves the construction of § 516.100 and § 516.120, R.S.Mo., and is within the jurisdiction of the Missouri Supreme Court pursuant to Missouri Constitution Article V, §4, and Missouri Supreme Court Rule 84.23.

STATEMENT OF FACTS

In 2002, Matthew Headly Holdings, LLC (hereinafter “MHH”) sued McCleary, Inc. and two individual defendants in the U.S. District Court for the Western District of Missouri in *Matthew Headly Holdings v. McCleary, Inc., et al.*, Case No. 02-0654-CV-W-FJG (hereinafter “the McCleary lawsuit”). (Exh. 3, First Amended Petition, p. 2, ¶ 4; Exh. 6, Motion for Summary Judgment, p. 3, ¶ 1). In October 2003, MHH hired Michael P. Healy and Tim E. Dollar (hereinafter “Relators”) as replacement counsel to try the case. In August 2004, the McCleary lawsuit was tried to a jury before the Honorable Fernando Gaitan. MHH argued that the McCleary defendants were liable on three theories: (1) breach of express contract (failure to perform distribution promise); (2) breach of implied duty of good faith (lack of effort in performing); and (3) fraud (concealment of material facts). MHH presented uncontroverted evidence of one indivisible stream of damages totaling \$8,662,000 resulting from the actions of the McCleary defendants. (Plts. Exhs. In Opp., p. 044).

Prior to and at trial, Relators offered Verdict form “C”. (Plts. Exhs. In Opp., pp. 004-006). Verdict form “C” was a Missouri Approved Instruction form (i.e., M.A.I. 36.05 and 36.11). (Plts. Exhs. In Opp., p. 006). Verdict form “C” provided a single damage line if the jury found in favor of plaintiff (MHH) on any of the three theories of recovery submitted against all defendants. (Plts. Exhs. In Opp., pp. 004-006). At the instruction conference, Relators contended in support of Verdict form “C”, “...there is no way to divide the damages between the fraud claims and the breach of contract and good

faith and fair dealing claims...therefore, the proper instruction is verdict form C which I will now tender.” (Plts. Exhs. In Opp., p. 36).

Before deliberations began Judge Gaitan gave the jury (among other instructions) the following verdict directing instructions: No. 10 (breach of express contract against corporate defendant); No. 11 (breach of implied duty of good faith against corporate defendant); Nos. 12, 13 and 14 (concealment of material facts against corporate defendant and two individual defendants). (See Motion to Supp. Record, Exh. 8, Instructions, pp. 11 – 15). Judge Gaitan rejected Relators proposed Verdict form “C” and instead submitted a Verdict form with a damage line for the two contract theories of recovery and a damage line for the concealment theory of recovery. (Plts. Exhs. In Opp., pp. 009-011).

On August 12, 2004, the jury returned a verdict in favor of MHH and against McCleary, Inc. (Plts. Exhs. In Opp., pp. 009-011). The jury verdict totaled \$8,600,000. (Plts. Exhs. In Opp., pp. 009-011). On the Verdict form submitted by Judge Gaitan, the jury allocated \$4.3 million against McCleary, Inc. for breach of express contract and breach of the implied duty of good faith and another \$4.3 million against McCleary, Inc. for concealment for a total of \$8.6 million. (Plts. Exhs. In Opp., pp. 009-011). “None” of the damages were allocated to the individual defendants on the concealment claim. (Plts. Exhs. In Opp., pp. 009-011).

After the Verdict was returned, Judge Gaitan gave the jury a Special Instruction, requiring the jury to further allocate the amounts between the two contract theories (express contract and implied duty of good faith) and between McCleary, Inc. and its two

principals, Pat McCleary and Jerry Stokely, the individual defendants on the concealment claim. (Plts. Exhs. In Opp., pp. 012-014). In response, the jury allocated \$2.15 million for breach of express contract, \$2.15 million for breach of the implied covenant of good faith, and \$4.3 million against McCleary, Inc., on the concealment claim but none against the individual defendants. (Plts. Exhs. In Opp., pp. 012-014).

In response to post-trial motions filed by McCleary, Inc. on February 25, 2005, Judge Gaitan reduced the total verdict by \$2.15 million to a total of \$6.45 million finding the claim for breach of implied covenant of good faith was duplicative of the claim for breach of contract. (Plts. Exhs. In Opp., pp. 015-017). Judge Gaitan entered a reduced Judgment on February 25, 2005, for \$6.45 million.

McCleary, Inc. appealed the judgment of \$6.45 million to the Eighth Circuit alleging numerous errors and asking for judgment in its favor on all claims. MHH cross-appealed arguing that Judge Gaitan's \$2.15 million reduction was error. The Eighth Circuit did not vacate all damages as McCleary, Inc. requested, but it did uphold Judge Gaitan's \$2.15 million reduction. On May 19, 2006, the Eighth Circuit further reduced the verdict by another \$4.3 million because, unlike Judge Gaitan, it thought McCleary Inc.'s *respondeat superior* argument was correct in that the jury awarded \$4.3 million in damages solely against McCleary, Inc., but did not award damages against McCleary, Inc.'s agents individually (i.e., the *McGinnis Rule*). (Plts. Exhs. In Opp., pp. 018-035). The decisions by Judge Gaitan and the Eighth Circuit resulted in recovery by MHH of \$2.15 million instead of \$8.6 million.

PROCEDURAL HISTORY

On March 10, 2011 (almost seven years after the jury verdict, and over six years after the verdict was reduced by Judge Gaitan), MHH sued Relators in *Matthew Headly Holdings, LLC v. Tim E. Dollar, et al.*, now pending in Division 1 of the Circuit Court of Jackson County, with Respondent The Honorable Sandra C. Midkiff presiding, Case No.1116-CV07373, claiming trial error and legal malpractice. Relators moved to dismiss MHH's claim of malpractice because it is barred by the five (5) year statute of limitations pursuant to § 516.120, R.S.Mo. (Exh. 2, Motion to Dismiss). On June 17, 2011, MHH filed its First Amended Petition and Affirmative Avoidances. (Exh. 3, First Amended Petition). In response to MHH's First Amended Petition, Relators filed an amended motion to dismiss on the grounds that MHH's claims are barred by the five (5) year statute of limitations provided in § 516.120 R.S.Mo. (Exh. 4, Amended Motion to Dismiss). After briefing and argument, on October 12, 2011, Respondent entered an Order overruling Relators' motion to dismiss the amended petition stating in part: "[t]he issue is better left to be adjudicated upon a motion for summary judgment, after both sides have the opportunity to conduct discovery on this issue." (Exh. 5, Order Overruling Motion to Dismiss, p. 2).

On April 26, 2012, after conducting discovery limited to the statute of limitations issue, Relators filed their motion for summary judgment arguing that MHH's claims are barred by the five (5) year statute of limitations provided in § 516.120 R.S.Mo. (Exh. 6, Motion for Summary Judgment). After briefing, on July 18, 2012, Respondent entered

an Order overruling Relators' motion for summary judgment on the statute of limitations defense. (Exh. 7, Order Overruling Motion for Summary Judgment).

On August 24, 2012, Relators filed this Application for a Writ of Prohibition to prevent Respondent from enforcing her Orders overruling Relators' motions to dismiss and for summary judgment.

POINT RELIED ON

I.

RESPONDENT SHOULD BE PROHIBITED FROM DENYING RELATORS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT BECAUSE THE LEGAL MALPRACTICE CLAIM OF MATTHEW HEADLY HOLDINGS, LLC (MHH) AGAINST RELATORS ARISING FROM THE USE AT TRIAL IN AUGUST 2004 OF A FORM OF VERDICT AND SPECIAL INSTRUCTION WHICH REQUIRED THE JURY TO DIVIDE INDIVISIBLE DAMAGES AMONG MULTIPLE CONSISTENT THEORIES OF RECOVERY RESULTING IN A REDUCTION OF THE FINAL JUDGMENT COLLECTED BY MHH IS BARRED BY THE FIVE YEAR STATUTE OF LIMITATIONS BECAUSE MHH FILED ITS LAWSUIT AGAINST RELATORS ON MARCH 10, 2011 – MORE THAN FIVE YEARS AFTER ITS DAMAGES WERE CAPABLE OF ASCERTAINMENT ON FEBRUARY 25, 2005 WHEN THE TRIAL JUDGE REDUCED THE JURY VERDICT BY 2.15 MILLION DOLLARS.

Dixon v. Shafton, 649 S.W.2d 435 (Mo. banc 1983)

Ferrellgas, Inc. v. Edward A. Smith, P.C., 190 S.W.3d 615 (Mo.App.W.D.2006)

M&D Enterprises, Inc. v. Wolff, 923 S.W.2d 389 (Mo.App.S.D.1996)

Mo. Rev. Stat. § 516.100

Mo. Rev. Stat. § 516.120

LEGAL ARGUMENT

I.

RESPONDENT SHOULD BE PROHIBITED FROM DENYING RELATORS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT BECAUSE THE LEGAL MALPRACTICE CLAIM OF MATTHEW HEADLY HOLDINGS, LLC (MHH) AGAINST RELATORS ARISING FROM THE USE AT TRIAL IN AUGUST 2004 OF A FORM OF VERDICT AND SPECIAL INSTRUCTION WHICH REQUIRED THE JURY TO DIVIDE INDIVISIBLE DAMAGES AMONG MULTIPLE CONSISTENT THEORIES OF RECOVERY RESULTING IN A REDUCTION OF THE FINAL JUDGMENT COLLECTED BY MHH IS BARRED BY THE FIVE YEAR STATUTE OF LIMITATIONS BECAUSE MHH FILED ITS LAWSUIT AGAINST RELATORS ON MARCH 10, 2011 – MORE THAN FIVE YEARS AFTER ITS DAMAGES WERE CAPABLE OF ASCERTAINMENT ON FEBRUARY 25, 2005 WHEN THE TRIAL JUDGE REDUCED THE JURY VERDICT BY 2.15 MILLION DOLLARS.

A. PROHIBITION IS APPROPRIATE.

Prohibition is a discretionary writ which issues to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power. State ex rel. Proctor v Messina, 320 S.W.3d 145, 146 (Mo. banc 2010); State ex rel. McDonald's Corp. v. Midkiff, 226 S.W.3d 119, 122 (Mo. banc 2007). Prohibition can be an appropriate remedy for an erroneous decision to overrule a party's motion for summary judgment. State ex rel. Marianist Province of U.S. v. Ross, 258

S.W.3d 809, 810 (Mo. banc 2008); State ex. rel. BP Prods, N.A., Inc. v. Ross, 163 S.W.2d 922, 923-24 (Mo. banc 2005). The essential function of a writ of prohibition is to confine a lower court within its proper jurisdiction and prevent it from acting without or in excess of its jurisdiction. State ex rel. Kubatazky v. Holt, 483 S.W.2d 799, 804 (Mo.App.1972). Prohibition is generally allowed to avoid useless suits and thereby minimizes inconvenience, and to grant relief when proper under the circumstances at the earliest possible moment in the course of litigation. State ex rel. Hamilton v. Dalton, 652 S.W.2d 237, 239 (Mo.App.E.D.1983). A writ of prohibition is the appropriate remedy when an error of law cannot be remedied adequately by appeal and will cause unnecessary, inconvenient and expensive litigation. State ex rel. Police Retirement System of St. Louis v. Mummert, 875 S.W.2d 553, 555 (Mo. banc 1994).

A permanent writ of prohibition should issue here as a result of Respondent's erroneous decisions denying Relators' motions to dismiss and for summary judgment because MHH's claim against Relators is barred by the five (5) year statute of limitations prescribed by § 516.120, R.S.Mo.

B. THE FIVE YEAR STATUTE OF LIMITATIONS EXPIRED BEFORE MHH SUED RELATORS.

1. More than five (5) years elapsed after MHH was damaged by the "wrong" allegedly committed by Relators before it filed its lawsuit.

On August 12, 2004, Relators' Verdict form "C" was rejected by Judge Gaitan and the jury returned its verdict in the McCleary lawsuit dividing the damages between the contract and concealment claims and further, in response to Judge Gaitan's special

instruction, dividing the contract damages between the express contract and implied contract claims. On February 25, 2005, Judge Gaitan vacated \$2.15 Million of the verdict returned in favor of MHH. More than five years later on March 10, 2011, in contravention of § 516.120, R.S.Mo., MHH sued Relators.

2. The statute of limitations is strictly applied as a question of law when the facts are clear.

Whether the statute of limitations bars a cause of action is a question of law for the Court to decide. Overlap, Inc. v. A.G. Edwards & Sons, Inc., 318 S.W.3d 219, 228 (Mo.App.W.D.2010) (citation omitted). Missouri courts have applied statutes of limitations with some strictness, and exceptions and estoppels have been rather grudgingly found. Rose v. City of Riverside, 827 S.W.2d 737, 739 (Mo.App.W.D.1992) (citing Dixon v. Shafton, 649 S.W.2d 435, 440 (Mo. banc 1983)). Summary judgment is generally appropriate in statute of limitation situations because the underlying facts are relatively easy to develop. Id.

3. The five (5) year statute of limitations prescribed by § 516.120, R.S.Mo. applies to MHH's claim against Relators

MHH's claims, however titled, are dependent upon allegations of legal negligence, and the five (5) year statute of limitations for legal negligence governs. § 516.120, R.S.Mo.; Murray v. Fleischaker, 949 S.W.2d 203, 206 (Mo.App.S.D.1997). Respondent agrees that, "because all of Plaintiff's claims stem from allegations of legal negligence RSMO § 516.120(4), prescribing a five-year statute of limitations, controls". (Exh. 7, Order Overruling Motion for Summary Judgment, p. 3).

Pursuant to § 516.120, R.S.Mo., MHH was required to file its claim within five years after the cause of action accrued. § 516.100, R.S.Mo. This statute states in part:

...the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and capable of ascertainment, and if more than one item of damage, the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

It is therefore necessary to determine what “wrong or technical breach of contract or duty” is alleged and when the “damage resulting therefrom” was sustained and capable of ascertainment.

4. MHH alleges one fundamental wrong, breach of contract, or breach of duty resulting in its claimed damages.

MHH has alleged seven counts against Relators. (Exh. 3, First Amended Petition). Each count arises from the same operative “wrong” or breach of contract or duty resulting in damage claimed by MHH. Whether claimed to constitute negligence, breach of contract, or breach of fiduciary duty, MHH alleges in each count of its amended petition (directly or by reference) that Relators erred in:

- a. failing to understand the law and procedure applicable to plaintiff’s case, instructions and damages;
- b. failing to understand the law and procedure in instructing the jury;
- c. failing to preserve alleged trial court error in refusing *Verdict Form C*;

- d. failing to properly instruct the jury;
- e. failing to adequately educate the jury on how instructions operated;
- f. failing to adequately educate the jury on how to properly complete the verdict forms;
- g. failing to recognize glaring defects in the verdicts;
- h. failing to take timely action to correct the defects;
- i. urging the court to discharge the jury instead of correcting the verdicts; and
- j. failing to disclose their errors to plaintiff and taking fees and charges.

(Exh. 3, First Amended Petition, p. 7, ¶ 32; pp. 8-9, ¶ 40; pp. 10-11, ¶ 48).

Each “failure” alleged is fundamentally the division of indivisible damages among theories of recovery. No matter how it is characterized in its amended petition, MHH ultimately finds fault with Relators’ actions allowing the division of damages after proving indivisible damages. This one alleged “wrong” resulted in the damages claimed by MHH. Whether as a result of alleged negligence, breach of contract, or breach of fiduciary duty, MHH claims the following as damages:

- a. Liquidated damages (\$6,450,000 which is the amount by which the verdict was reduced post-trial);
- b. Damages from destruction of its business (at least \$25.8 million);
- c. Attorneys’ fees in collateral litigation (approximately \$200,000);
- d. Debt service on additional business loan (approximately \$20,000 per month);
- e. Attorneys’ fees taken (\$1,027,820.54).

(Exh. 3, First Amended Petition).

Each item of alleged damage resulted from the division of the indivisible damages among three viable theories by which McCleary, Inc. was liable to MHH. If the jury had completed Verdict form C, rather than the Verdict form used, there would have been no duplication or *McGinnis Rule* violation. As a result, there would have been no basis to vacate \$2.15 Million of the verdict on February 25, 2005, and there would have been no basis to vacate \$4.3 Million of the verdict on May 19, 2006.

5. MHH's damages were sustained and capable of ascertainment on February 25, 2005 when Judge Gaitan vacated \$2.15 Million of the Verdict and MHH's cause of action accrued at that time.

A cause of action accrues when the damage from the wrong is sustained and capable of ascertainment. § 516.100, R.S.Mo. When damages are “capable of ascertainment” is a question of law for the Court. Anderson v. Griffin, Dysart, Taylor, Penner & Lay, P.C., 684 S.W.2d 858, 860-61 (Mo.App.W.D.1984). This test is an “objective” test not dependent on the subjective mindset of the plaintiff. Powel v. Chaminade College Preparatory, Inc., 197 S.W.3d 576, 582 (Mo. banc 2006). Damage is sustained and “capable of ascertainment” for purposes of the statute of limitations when it can be discovered or made known, even though the amount of damage is unascertained. Modern Tractor & Supply Co. v. Leo Journagan Constr. Co., Inc., 863 S.W.2d 949, 952 (Mo.App.S.D.1993). When the **fact of damage** becomes capable of ascertainment, the statute of limitations is put in motion. Bower v. Davidson, Deckert, Schutter & Glassman, 686 S.W.2d 1, 4 (Mo.App.W.D.1984) (emphasis in original). Damage is sustained and capable of ascertainment when a plaintiff could discover the damage

despite his remaining ignorance of the extent of damage. M&D Enterprises, Inc. v. Wolff, 923 S.W.2d 389, 394 (Mo.App.S.D.1996). The extent of potential damages need not even be knowable. Klemme v. Best, 941 S.W.2d 493, 497 (Mo. banc 1997). All that is required is that some damage be sustained. Id.

Damage was sustained by MHH and was capable of ascertainment by MHH on February 25, 2005, when Judge Gaitan vacated \$2.15 Million of the amount awarded by the jury on August 12, 2004. On February 25, 2005, by Judge Gaitan's Order, MHH lost \$2.15 Million. MHH admittedly knew of Judge Gaitan's Order and its loss. (Exh. 6, Motion for Summary Judgment, p. 4, ¶ 9). As Respondent correctly stated in her Order denying summary judgment to Relators:

With regard to the claim relating to defendants' jury instructions and verdict form submission, the court finds that the "damage" was capable of ascertainment when Judge Gaitan initially reduced the award amount by \$2.15 million on February 25, 2005. That is the date on which the "fact of damage" was capable of ascertainment by a reasonable person. Plaintiff lost \$2.15 million of the verdict awarded by the jury, based on Judge Gaitan's reasoning that the jury instructions allowed duplicative damages.

(Exh. 7, Order Overruling Motion for Summary Judgment, p.4). Because MHH suffered damage capable of ascertainment on February 25, 2005, its cause of action, if any, against Relators accrued on that date. MHH was required to file its claim within five (5) years of that date.

6. MHH's time to file its claim was not extended because an appeal was pending.

This Court has held:

In many actions the extent of damage may be dependent on uncertain future events . . . [s]uch uncertainties have never been held to preclude the filing of suit and . . . have not delayed the accrual of the plaintiff's claim for purposes of the statute of limitations. The most that it required is that some damages have been sustained, so that the claimants know that they have a claim for some amount.

Dixon, 649 S.W.2d at 439. The test is when the plaintiff could have first successfully maintained the action. See Modern Tractor & Supply Co., 863 S.W.2d at 952.

It is well-settled that the extent of damage may be dependent on uncertain future events, but this has "never been held to preclude the filing of suit" or delay the accrual of a claim for the purposes of the statute of limitations. M&D Enterprises, Inc., 923 S.W. 2d at 394 (quoting Dixon, 649 S.W.2d at 437). Rejecting the argument that the cause of action did not accrue before resolution of the underlying claim and that the claimant in a legal malpractice action did not know the value of his claim "until the jury comes back or the case is settled", the Court in M&D Enterprises held the statute of limitations barred the claim for legal malpractice. 923 S.W.2d 389.

7. MHH's time to file its claim was not extended because the 8th Circuit Court of Appeals reduced the judgment further.

In M&D Enterprises, the Court also addressed and rejected the “last item of damage” argument. Id. at 397-98. The claimant in M&D Enterprises argued its cause of action did not accrue until it sustained its last item of damage when it settled the underlying lawsuit. Id. The Court dismissed the argument noting Dixon, supra, and several other cases involving legal malpractice claims have held the statute of limitations commenced to run before resolution of the underlying dispute upon which those claims were based and in none of those cases was the accrual of a cause of action delayed by the fact that a person sustained later damage resulting from the same acts which also produced earlier ascertainable damage. Id. at 398. Damage resulting from one wrong that continues and becomes more serious over time does not extend the time within which suit may be brought. Arst v. Max Barken, Inc., 655 S.W.2d 845, 847 (Mo.App.E.D.1983).

8. Respondent incorrectly found MHH asserted two separate claims of malpractice resulting in separate and distinct items of damage which were not tied causally or factually to each other.

In overruling Relators’ motion for summary judgment, Respondent incorrectly interpreted MHH’s First Amended Petition and the summary judgment record finding that MHH alleged two separate causes of action for legal malpractice against Relators resulting in two separate items of damage. In her Order, Respondent reasoned that MHH asserted two distinct and separate claims for malpractice, to-wit:

One is based on the jury instruction(s) and verdict form submitted by defendant at the trial of plaintiff’s case. (First Amended Petition –

Para.32 (a)-(f)). Another is based on defendant's failure to recognize and take timely action to correct the defects in the jury's verdicts. (First Amended Petition – Para 32(g)-(i)).

(Exh. 7, Order Overruling Motion for Summary Judgment, pp. 3 - 4).

Respondent further reasoned that the “two distinct claims of malpractice require[d] separate analysis.” (Exh. 7, p. 4). As to the “jury instruction/verdict form claim”, Respondent concluded MHH suffered ascertainable damage on February 25, 2005 when Judge Gaitan reduced the verdict by \$2.15 million, stating: “[t]hat is the date on which the “fact of damage” was capable of ascertainment by a reasonable person”. (Exh. 7, p. 4). According to Respondent's reasoning and finding, the “jury instruction/verdict form claim” is barred by Section 516.120, R.S.Mo., because it was not filed within five (5) years of February 25, 2005. (Exh. 7, p. 4).

Although Respondent described the “second distinct claim of malpractice” as “defendant's failure to recognize and take timely action to correct the defects in the jury verdicts”, the Order does not analyze when damage resulting from this claim was ascertainable. (Exh. 7, p. 4). Instead, Respondent discusses the reduction of the verdict by the 8th Circuit as a second item of damage and concludes it is “separate and distinct” and not necessary (sic) tied causally or factually” to the reduction in the verdict by Judge Gaitan. (Exh. 7, p. 3).

Respondent's conclusion is incorrect. The reduction of the verdict by Judge Gaitan and the reduction of the verdict by the 8th Circuit both resulted from the division of indivisible damages on the verdict form. If a single damage line verdict form (as

tendered by Relators) had been used, the jury would have assessed MHH's damages one time. There would have been no duplication. Furthermore, there would have been no *McGinnis Rule* violation because Judge Gaitan's verdict directing instruction on the concealment claim against McCleary, Inc. (Instruction No. 12) was not premised on a finding against either individual defendant. Therefore, the two items of damage alleged are tied causally to the ultimate wrong alleged and damage from that alleged wrong was ascertainable on February 25, 2005.

CONCLUSION

WHEREFORE, for the foregoing reasons, Relators Tim E. Dollar, The Law Offices of Tim Dollar n/k/a Dollar, Burns & Becker, LLC, Michael P. Healy, and The Healy Law Firm, LLC respectfully pray that this Court issue a Writ of Prohibition preventing Respondent from enforcing her Orders overruling Relators' motions to dismiss and for summary judgment, and requests any further relief this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2012, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system and a copy was sent via U.S. Mail to the parties listed below:

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RULE 84.06(c) CERTIFICATION

The undersigned counsel for Relators herein by certifies that this Brief contains the information required by Rule 55.03. Additionally, this Brief complies with the limitations contained in Rule 84.06(b), in that it contains 4,106 words counted using Microsoft WORD. Furthermore, this Brief complies with Rule 84.06(g) in that the CD-ROM provided to the Court containing the Brief has been scanned for viruses and that is virus-free and has been formatted in Microsoft WORD.

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